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Supreme Court of the United States

October Term, 1965.

No. 1110

RICHARD ASH, SPERRY RAND CORP., GINN & COMPANY, HARPER & ROW, INC. and SCIENCE RESEARCH ASSOCIATES,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD ASH,
Pro Se,
Rittenhouse Claridge, Apt. 419,
Philadelphia, Pennsylvania.

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Richard Ash respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled matter on November 17, 1965.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 236 F. Supp 218 (E. D. Pa. 1964) (p. 13a). The opinion of the Court of Appeals for the Third Circuit is reported at 353 F. 2d 491 (1965) (p. 19a).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 17, 1965 and rehearing denied December 13, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

I. Does a shareholder have standing to sue derivatively under the federal antitrust laws, 15 U. S. C. 26, for injunctive relief to protect his corporation from prohibited anticompetitive behavior by a stranger corporation that threatens to permanently injure his corporation in its business activities, when the directors of his corporation decline to act directly upon due demand?

II. Does a shareholder have standing to sue on his own behalf under the federal antitrust laws, 15 U. S. C. 26, to enjoin prohibited anticompetitive behavior by a stranger corporation that threatens to permanently impair the nature and value of his investment?

STATUTES INVOLVED.

The statutory provisions involved are 15 U. S. C. A. 18 and 15 U. S. C. A. 26, Sections of the Clayton Act, 15 U. S. C. A. 12, et seq. Pertinent portions of these sections are printed in Appendix A, infra (p. 1a).

STATEMENT OF THE CASE.

This controversy arises out of the acquisition by defendant, IBM, of the assets of Science Research Associates, a virile, rapidly-growing firm dominant in the newly developing field of programmed instruction techniques. This

acquisition gave IBM, a corporation with gross income of over $2,000,000,000 annually and net profits in excess of $400,000,000 annually, entrance into the educational training materials market, dwarfing all other competing firms within that market. Petitioner held shares of stock in Sperry-Rand which is the chief competitor of IBM in the business data processing market, and in Harper and Row, and Ginn and Co., which compete with Science Research Associates in the educational materials market. Petitioner believed that this acquisition by IBM was violative of Section 7 of the Clayton Act and would be substantially adverse to the competitive position of these various corporations.

On this basis petitioner called on the directors of these corporations to seek injunctive relief under Section 16 of the Clayton Act to prevent this then proposed acquisition by IBM. These corporations either declined to act or failed to respond in timely fashion and petitioner then brought the instant action derivatively on behalf of these corporations, and directly on behalf of himself, to enjoin the consummation of this acquisition under Section 16 of the Clayton Act.

In the shadow of the pending action for injunctive relief, IBM chose to consummate the acquisition before any hearing on the matter, and then moved to dismiss the action on various preliminary grounds under Rule 12 F. R. C. P. The District Court sustained the motion to dismiss on two grounds without deciding the others (*Ash v. International Business Machines, Inc.*, 236 F. Supp. 218, E. D. Pa. 1964) (p. 13a). The grounds supporting dismissal below were: (p. 19a).)

1. Plaintiff shareholder has no standing to bring this suit on his own behalf under Section 16 of the Clayton Act.

2. Since the plaintiff shareholder has not alleged any facts to show that the boards of directors of these corpora-

tions, on whose behalf he seeks to sue derivatively, have gone beyond the bounds of reason in their decision not to sue, and he has not alleged any breach of trust on their part, plaintiff may not bring this action derivatively.

On appeal the Third Circuit affirmed the decision of the District Court and denied petition for rehearing. (*Ash v. International Business Machines, Inc.*, 335 F. 2d 491 (1965) (pp.).)

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court Below Denying Petitioner's Standing to Pursue the Instant Action Derivatively Vitiates Major Congressional Policy Underlying Section 16 of the Clayton Act.

The Congressional intent in passing private remedial anti-trust legislation such as section 16 of the Clayton Act was not simply to protect individual enterprise, but in its end result to augment the attorney general's role in protecting the consuming public from monopolistic exploitation. In *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947), this court stated on this point at page 751:

> "* * * It is clear that Congress intended to use private self-interest as a means of enforcement * * * when it gave to any injured party a private cause of action * * *".

The Court below in a previous decision, *Bergen Drug Co. v. Parke Davis*, 307 Fed. 2d 725 (3rd Cir. 1963), recognized this guiding principle stating at pp. 727-28:

> "Private actions are an important means of enforcing the antitrust laws of the United States. Such actions are a vehicle for serving not only the immediate interests of the litigants, but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce. Congress voiced its recognition of the importance of private actions by enacting special provisions for treble damages and attorneys' fees. That, indeed, weighs heavily with this court in considering whether equity jurisdiction should be exercised."

citing ——

> "Final Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 378-388 (U. S. Govt. Printing Office, 1955): Comment, 61, Yale L. J. 1010, 1057-1058 (1952)."

This aspect of the Congressional purpose is most effectively carried out by an action such as that at bar, where the type of relief sought is preventive in nature and will thus nip the anticompetitive behavior in the bud. It is thus incumbent on the courts not to unduly impede the road to premerger judicial scrutiny.

The weight to be accorded management's decision not to participate directly, as a barrier to the maintenance of a stockholder's derivative action to enforce a company's antitrust remedies against a competing corporation, is evaluated in Blake, Shareholder's Role in Antitrust Enforcement, 110 Pa. L. Rev. 143 (1961), at page 149:

> "but even when defendant is a competitor a general distaste to become an antitrust plaintiff may weigh heavily in management's decision. In an ordinary commercial case it seems reasonable that this consideration be given considerable weight in evaluating the director's decision. However, it is open to serious question whether Congress' policy of encouraging antitrust enforcement through private suits should be defeated

by giving weight to management reluctance to upset perhaps overly amicable relationships within the industry."

The Court below has, however, here held that a decision by corporate directors, who are as a group emotionally less than cordial to the ends and aims of antitrust legislation in the same sense as union leaders and Taft-Hartley, will defeat both the legitimate interest of a shareholder in protecting his corporation's enterprise from unlawful encroachment, and the congressional purpose of encouraging the widest scrutiny of business relationships for the ultimate protection of the general public.

In addition the very economic aggressions from which Congress is trying to provide protection via section 16, may make it impossible for the injured corporation to utilize this channel directly. The threat of economic reprisal can be a major deterrent to litigation when the disparity in competitive strength is acute, and when judicial protection is most needed. "Strong competitors can threaten to 'intensify' competition, or where patents are concerned, harry plaintiffs with costly infringement litigation. Since the line between subtle reprisal and justified business practice is difficult to draw, victims have little change of subsequent legal redress. Consequently, plaintiffs may remain inactive or seek enforcement through protective anonymity of complaints voiced with the Justice Department or Federal Trade Commission." (Yale Law Journal, Antitrust Enforcement, V. 61: 1010, 1057-1058, 1952.) Closing the doors to petitioner's action may thus cut off the only realistic road to judicial relief for the small and weak corporation.

Standing to sue derivatively under a Federal statute is a question of Federal law and should be determined to further the Congressional purposes motivating the statute. *Mc-*

Lure v. Borne Chemical Co., 292 F. 2d 824 (3rd Cir. 1961); *Rogers v. American Can Co.*, 305 F. 2d 297 (3rd Cir. 1962).

Thus, on the basis of the compelling public policy that is furthered by private antitrust enforcement, the congressional intent to utilize and encourage this type of activity, the especially effective nature of preventive action through injunction via section 16 of the Clayton Act and the hidden dangers and deterrents that may impede the small and weak corporations that most need judicial protection from its direct utilization; section 16 of the Clayton Act must be held to reach the action at bar.

II. The Decision of the Court Below is at Variance with a Long Line of Decisions of this Court Holding that a Shareholder's Derivative Action is Maintainable to Enjoin Unlawful Activity of a Third Party which Threatens to Permanently Impair the Nature and Scope of His Corporation, when the Directors of His Corporation Decline to Become Involved.

The Court below denied petitioner's right to bring this action derivatively on the basis that such an action "can be maintained only if the stockholder shall allege and prove that the directors of the corporation are personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way", and that "nothing is pleaded or even suggested to indicate that the refusal of the directors to sue was fraudulent or collusive, or represented anything worse than unsound business judgment honestly exercised in the corporate interest." *Ash v. International Business Machines, Inc.*, 353 F. 2d 491 (1965), at page 493 (pp. 20a, 21a). It is respectfully submitted that

this evaluation by the Court below of petitioner's claim is at variance with a long line of decisions of this honorable court holding in similar factual situations that inaction by the corporate directors, for whatever reason, provided a basis for equitable intervention via the stockholders derivative suit.

For the purposes of a preliminary motion to dismiss, the facts as pleaded are accepted as true together with the fair inferences therefrom, *Conley v. Gibson*, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed 2d 80 (1957). Petitioner's complaint states that defendant corporation, grossing $2 billion and netting over $300 million annually, is unlawfully going to enter active competition with petitioner's corporations Ginn & Co. and Harper and Row grossing under $50 million individually. (Complaint Count I, p. 3a.) In addition it states that defendant's unlawful entry into the educational field will tend to pre-empt for defendant a lucrative and expanding market to the permanent detriment of petitioner's corporation Sperry Rand which competes with defendant. (Complaint Count II, p. 8a.) The injury to petitioner's corporations stemming from defendant's unlawful act is of a permanent and continuing nature and will affect these corporations in the future nature and scope of their enterprise. It is well within the realm of possibility that Harper and Row and Ginn and Co. might ultimately be extinguished as a result of defendant's engaging in competition with them. The root of petitioner's complaint is that he is before this court to protect his corporations because they declined to protect themselves from an unlawful act of defendant which threatens to permanently injure the nature and scope of their enterprise.

The sound business judgment doctrine may insulate a corporate decision to sue or not to sue on an indebtedness, since such a decision does not ordinarily have a permanent effect on the nature and scope of its business. On the other hand,

the inactivity of the directors in petitioner's corporations constitutes a clear breach of their duty to diligently protect their corporations' enterprise providing the basis for equitable intervention through a stockholder's derivative suit.

This Court has affirmed this principle on numerous occasions. In the leading case of *Dodge v. Woolsey*, 59 U. S. 331 (18 How.) (1855), a derivative action was held to be maintainable where the plaintiff alleged that his corporation was willingly submitting to an unconstitutional state tax. In the case of *Samuel v. Holiday*, Case No. 12288; 21 Fed. Cases 306 (1869), the Court at page 311 interpreted the decision of *Dodge v. Woolsey*, supra, to include the following proposition:

> "When a corporation or its rights of property are threatened with an injury of such a nature as the court will enjoin, but it refuses to take any legal steps to protect itself, a stockholder may maintain a bill in equity against the party threatening the mischief and the corporation, to restrain by injunction the commission of the act, in order thereby to protect his interest from immediate damage."

This is precisely petitioner's position.

Greenwood v. Freight Co., 105 U. S. 13 (1881), was a derivative suit brought by a shareholder in a street railway company to enjoin an allegedly unconstitutional state action which would have taken his corporation's right of way, on payment of compensation, for use by another street railway company. His own corporation's directors were uninvolved but declined to act "saying that the assertion of the rights of the corporations in the state courts is accompanied by so many embarrassments that they declined to attempt it", *Greenwood v. Freight Co.*, supra, at 15. In *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429 (1894), the Court permitted a derivative action by a

shareholder to enjoin his corporation's voluntary payment of an allegedly unconstitutional federal tax.

Cotting v. Kansas City Stockyard Co., 183 U. S. 79 (1901), was a derivative suit to enjoin the enforcement of an allegedly illegal state rate schedule. *Chicago v. Mills*, 204 U. S. 321 (1906), was a derivative suit brought by a stockholder of the People's Gas, Light and Coke Co. to enjoin enforcement of an allegedly illegal rate schedule that would have impaired the corporation's operation.

In *Ashwander v. T.V.A.*, 297 U. S. 288 (1935), a derivative suit by a shareholder of the electric company was held maintainable against the T.V.A. to assert, in essence, the corporation's legal remedies against allegedly unlawful competition by the T.V.A.

The common thread connecting the above cited decisions of this court is clear. In each of them an allegedly unlawful act by a third party threatened permanent harm to the corporation's interests. Since the directors of a corporation have the duty to protect the nature and scope of its enterprise their failure to act in the face of well pleaded allegedly unlawful encroachment by a third party carrying with it the fair inference of permanent harm to the corporation's interests provides the basis for equitable intervention via the derivative suit. In accepting jurisdiction in such cases the court does not act inappropriately, since it will function solely within its sphere of judicial competence in deciding the underlying issue of whether or not the detrimental activity of the third party is illegal, and it will in no way inject itself into those areas appropriate only to management expertise.

A long line of the court's precedents thus make clear that this action can not be dismissed preliminarily on the basis of the sound business judgment doctrine since the very issue of sound business judgment turns on the merits of the cause of action.

III. The Decision of the Court Below that a Shareholder Cannot Maintain an Action on His Own Behalf Under Section 16 of the Clayton Act to Prevent Threatened Loss or Damage to His Shareholdings Resulting from Anticompetitive Encroachment by a Third Party Upon His Corporation, is at Variance with the Clear Statutory Language, and is Supported by no Meaningful Precedent.

The pertinent language of Section 16 of the Clayton Act (38 Stat. 737; 15 U. S. C. §26), states:

> "That any *person*, firm, corporation or association shall be entitled to sue for and have injunctive relief—against threatened loss or damage by violation of the antitrust laws."

Petitioner as a shareholder is a part owner of the various businesses here involved. His complaint alleges that these businesses are the subject of prohibited anticompetitive behavior by defendant threatening them with loss and damage. It follows clearly that petitioner's individual interest in such businesses is similarly threatened with loss or damage by defendant's activities. Thus petitioner qualifies as a person entitled to relief within the context of the clear statutory language of Section 16 of the Clayton Act (supra).

The same underlying policy considerations discussed under I with regard to the derivative action also dictate that the instant action be maintainable by petitioner individually. These include the broadening of preventive antitrust enforcement review for the ultimate protection of the general public, and the providing of a feasible road to relief for the small and weak corporation that cannot afford the risk of a direct conflict with a giant of industry.

Moreover there is no meaningful precedent supporting

dismissal of the type of action here in issue. It is respectfully suggested that *Continental Securities Co. v. Michigan Central R. R.*, 16 F. 2d 378 (6th Cir. 1926), cert. denied, 274 U. S. 741; *Gomberg v. Midvale Co.*, 157 F. Supp. 132 (E. D. Pa. 1955); *Brill v. General Industrial Enterprises, Inc.*, 234 F. 2d 465 (3rd Cir. 1956), relied on by the court below as foreclosing this action are not in fact a barrier. In all of these cases the shareholder sued his own corporation to enjoin it from engaging in prohibited anticompetitive behavior, on the basis that the results of such anticompetitive behavior threatened loss or damage to the corporation resulting from potential triple damage suits. In essence the shareholder attempted to utilize Section 16 of the Clayton Act to enjoin his own corporation from engaging in an unlawful act, alleging that the potential penalties resulting from the unlawful act were threatened loss or damage within the meaning of Section 16 of the Clayton Act. The holding of these cases was merely that such threatened loss or damage stemming from potential triple damage suits was not within the scope of the meaning of Section 16 which meant threatened loss or damage resulting directly from anticompetitive encroachment. In the instant case the appellant sues on his own behalf to protect his corporate holdings from threatened loss or damage resulting directly from anticompetitive encroachment thereon by a stranger corporation.

Loeb v. Eastman Kodak Co., 183 Fed. 704 (3d Cir. 1910), involved an action for triple damages brought by a corporate shareholder on his own behalf on the basis of anticompetitive encroachment on his corporation. There is a significant difference between an action such as *Loeb* where triple damages were sought and the case at bar where injunctive relief is sought. The decision in *Loeb* was in fact based on the reasoning that the maintenance of an individual triple damage action would result either in double recovery against the wrongdoer or in the dissipa-

tion of corporate assets into the hands of its individual shareholders. No such problem presents itself in the action at bar.

In *J. I. Case Co. v. Borak*, 377 U. S. 426 (1963), this Court, in response to the underlying congressional purpose, carved out a channel by implication to protect a shareholder whose rights had been invaded through violation of the Securities and Exchange Act. On this point the court stated at 433:

> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

In the case at bar an explicit channel exists and the overall congressional purpose dictates that it not be unduly narrowed. Dismissal of this action without reaching the merits would seem in conflict with the spirit and the holding in *J. I. Case v. Borak*, supra.

CONCLUSION.

The decision below, denying petitioner his day in court on the merits of either his derivative or direct action, not only deprives him of his seemingly clear road to statutory relief within the scope of both the congressional purpose and language, but in addition has the gravest consequence in terms of the economic well being of the society in general. The business of business is trade not merger. Merger is the unusual not the ordinary, and it was the intent of Congress that the appropriateness of such activity should be subject to the scrutiny of the courts, at the behest of those affected, inter alia, for the ultimate protection of the general public. The decision below which now insulates such activity from the scrutiny of the shareholding class curbs a

varied and effective segment of our society from expressing its legitimate interest and concern. Leaving such decisions solely in the hands of corporate management literally cuts the guts, heart, and hope out of any effective implementation of this underlying public policy. In this time of corporate mergermania, with behemoth swallowing colossus, the undue narrowing of judicial merger review inherent in this decision is gravely inappropriate.

Wherefore your petitioner respectfully prays that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

RICHARD ASH,
Pro Se.

APPENDIX A.

CLAYTON ACT, 15 U. S. C. A. §12 et seq.

§18. Acquisition by one corporation of stock of another.

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

. . . Oct. 15, 1914, c. 323 §7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

§26. Injunctive relief for private parties; exception.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as in-

junctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate; a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitled any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, §16, 38 Stat. 737.

APPENDIX B.

DOCKET ENTRIES.

1964

Feb. 24 Complaint filed.

Feb. 24 Summons exit.

Mar. 4 Summons returned: "on 2-27-64 served" and filed.

Mar. 4 Affidavit of Richard Ash re: Verification of complaint; filed.

Mar. 18 Defendant's motion to dismiss, filed.

Apr. 7. Amendment to motion to dismiss and affidavit and exhibits in support thereof, filed.

Apr. 30 Order of Court continuing argument on deft's motion to dismiss scheduled before Davis, J. on 5-12-64 to next available argument list, filed. JMD

Sep. 1 Affidavit of Henry W. Trimble, Jr. in support of defendant's motion to dismiss, filed.

Sept. 14 Argued sur defendant's motion and amended motion to dismiss C.A.V. FVD (Plaintiff may file supplemental brief in 15 days, and defendant has 15 days in which to answer.)

Oct. 28 Memorandum in opposition to Defendant's motion to dismiss, filed.

Nov. 17 Memorandum in support of defendant's motion to dismiss, filed.

Nov. 17 Supplementary memorandum in opposition to defendant's motion to dismiss, filed.

Nov. 17 Reply memorandum in support of defendant's motion to dismiss, filed.

Nov. 25 Memorandum Opinion, Van Dusen, J., and Order GRANTING defendant's motion to dismiss, as amended, and entering JUDGMENT for defendant and against plaintiff, Richard Ash, with prejudice, filed. FVD (11-27-64 entered and notice mailed.)

Dec. 17 Notice of appeal of plaintiff, filed.

Dec. 17 Copy of Clerk's notice to U. S. Court of Appeals, filed. 12-18-64 copy to Wilbur H. Haines Jr.

Dec. 17 Plaintiff's bond for costs on appeal in the sum of $250.000 with cash security, filed.

COMPLAINT.

COUNT I.

1. This complaint is filed and this action is instituted against the defendant International Business Machines Corp. under sections 15 and 16 of the Act of Congress of Oct. 15, 1914, C 323, 38 Stat. 730, as amended, commonly

known as the "Clayton Act," in order to prevent violation by said defendants, as hereinafter alleged of Section 7 of the Clayton act.

2. Plaintiff Richard Ash brings this action on behalf of himself and of Harper & Row, Inc., and of Ginn & Co., Inc.

3. Plaintiff is now and was at the time of the formation of the agreement herein complained of, a stockholder in Harper & Row, Inc., holding 50 shares of common stock, and a stockholder in Ginn & Co., Inc., holding 30 shares of common stock.

4. This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

5. Defendant International Business Machines, Inc. has reached agreement with Science Research Associates, Inc., (hereinafter called S. R. A.) to acquire the assets of S. R. A. thereafter operating S. R. A. as a wholly owned subsidiary. This agreement is subject to ratification by the stockholders of S. R. A. on February 25, 1964.

6. The principal business activities of S. R. A. are (1) publishing instructional materials in basic subjects and guidance materials for use primarily in elementary schools and junior and senior high schools, and (2) publishing standardized intelligence aptitude and achievement tests and rendering testing services.

7. S. R. A. publishes and sells to elementary schools and junior and senior high schools new forms of instructional materials and workbooks in basic subjects utilizing modern learning principles, popularly termed programmed

teaching. These materials are designed to provide an individualized learning opportunity for each pupil. In schools utilizing these multilevel and programmed materials, each pupil conducts and evaluates his own work and records his progress, thus giving teachers increased time for individual instruction and permitting each pupil to learn and move ahead at a rate limited only by his individual learning capacity and motivation.

8. The programmed teaching technique with its highly efficient teacher utilization and individualized approach to learning captures a sharply growing share of the educational dollar. It seems likely that this technique may displace to a large degree the conventional textbook approach to education.

9. S. R. A. is a leader and pioneer in the field of programmed teaching technique. Its editorial technical and administrative staff and sales force include many highly trained professional educators and others who hold advanced academic degrees in their respective fields.

10. It is anticipated that most of present S. R. A. employees will continue in the service of the subsidiary of defendant which will carry on the S. R. A. business.

11. Plaintiff Harper and Row, Inc., operate as a subsidiary, the Row Peterson division.

12. Row Peterson is a leading company in the development and sale of teaching materials for the American educational system.

13. Plaintiff Ginn & Co. is a leading company involved in the development and sale of teaching materials for the American educational system.

14. Plaintiff's Harper & Row and Ginn & Co. compete with each other and with S. R. A. in the sale of their educational products.

15. Row Peterson division does a gross volume of approximately $17,000,000 in annual sales of educational materials out of Harper & Row's total gross of under $40,000,000.

16. Plaintiff Ginn & Co. does an annual gross of under $35,000,000 most of which is derived from educational materials.

17. S. R. A. does a current annual gross of approximately $8,000,000 in teaching materials out of a total gross of $14,000,000.

18. S. R. A. has exhibited vigorous growth in penetrating the educational market with its modern teaching materials as evidenced by its growth in sales in this market from $1,727,000 in 1959 to $7,858,000 in 1963.

19. Defendant corporation does a gross business of over 2 billion dollars annually with net earnings of $290,000,000.

20. Defendant maintains a highly efficient marketing organization with sales offices distributed throughout the country.

21. The entry of a competitive giant such as Defendant into the field of educational training materials will substantially lessen competition within that field.

22. S. R. A. operating as a subsidiary of defendant will have a unique competitive advantage. It will be able to

rely on the vast financial strength of defendant to bear the heavy burden of teaching program development and in addition on the power and influence of the highly efficient nationwide network of defendant's sales offices to merchandise its products vigorously.

23. The modern so-called programmed instruction approach to education which allows the student to progress at his own rate utilizes a so-called teaching machine to control the flow of instructional material to the student.

24. This machine can range from a crude mechanical device for each student to a central electronic computer which transmits to each student's display unit the next step in his learning process.

25. Schools are now being operated experimentally utilizing a central computer controlled by a sequenced teaching program and it seems certain that there will be a vast market for such electronic teaching complexes.

26. Defendant is the leading factor in the business machine, data processing, electronic computer industry. In extending its electronic computer sales into the teaching machine industry, it is quite likely that it will maintain this dominant position. It is probable that the electronic teaching systems that defendant markets will tie in with S. R. A. teaching programs.

27. This potential tie in of the probable dominant producer of electronic teaching complexes with a leading producer of teaching programs will be substantially adverse to the competitive position of the independent teaching material producers such as Plaintiffs.

28. The proposed acquisition of assets is illegal under section 7 of the Clayton Act on the basis of the adverse competitive effects alleged in paragraph 22 and paragraph 27.

29. On Feb. 13, 1964 plaintiff Richard Ash delivered to the officers and directors of Harper & Row Inc., and Ginn and Co., a statement of the aforesaid allegations and a formal demand that the companies should seek injunctive relief under section 16 of the Clayton act. The president of Ginn & Co. wrote declining immediate action; as of this date there has been no response from Harper & Rowe. In the letters to these two corporations, it was pointed out that quick action was urgent since the ratification vote by the stockholders of S. R. A. is scheduled for Feb. 25. Plaintiff Richard Ash expressed in these letters and still feels that it is much sounder to take action to prevent the acquisition before it is consummated rather than to try to correct it as an accomplished fact. The acquisition details were not formally released until Jan. 28, hence there has been little time for action in this matter before the proposed ratification vote of Feb. 25. Since Harper & Row has approximately 1326 shareholders and Ginn & Co. approximately 5,233 shareholders, it has not been feasible to approach the shareholders directly in this matter.

COUNT II.

30. Plaintiff realleges paragraph 1.

31. Plaintiff Richard Ash brings this action on his own behalf and that of Sperry Rand Corp.

32. Plaintiff is now and was at the time of the formation of the agreement herein complained of a stockholder of Sperry Rand Corp. holding 57 shares of common stock.

33. Plaintiff realleges paragraphs 4 to 10 and 23 to 26.

34. Plaintiff corporation is the second largest factor in the electronic computer industry.

35. The tie in of the dominant computer manufacturer with S. R. A. one of the most vigorous companies in the development of modern educational techniques will give defendant corporation a vast competitive advantage in developing and marketing electronic teaching complexes.

36. This tie in will be substantially adverse to the competitive position of Plaintiff corporation and will result in a substantial lessening of competition in the development and marketing of electronic teaching complexes.

37. Therefore, the proposed acquisition of S. R. A. by defendant is violative of section 7 of the Clayton act.

38. On the 12th of Feb. 1964, plaintiff Richard Ash delivered to the president and board of directors of Sperry Rand a statement of the aforesaid allegations and a formal demand that the company should seek injunctive relief under section 16 of the Clayton act. General counsel of the corporation speaking for the president and board of directors has stated that the corporation declines to bring such action. Sperry Rand has about 193,000 shareholders and it would not have been feasible especially in view of the short time for action to approach them individually.

COUNT III.

39. Plaintiff Richard Ash is a citizen of the state of Pennsylvania; Plaintiff corporation Science Research Associates is incorporated under the laws of Delaware and has its principal place of business in Illinois; Defendant International Business Machines Corp. is incorporated under the laws of New York and has its principal place of business in that state. The matter in controversy exclusive of interests and costs exceeds $10,000.

40. Plaintiff Richard Ash brings this action on behalf of himself and Science Research Associates.

41. Plaintiff is now and was at the time of the formation of the agreement herein complained of a stockholder in Science Research Associates holding 25 shares of common.

42. Plaintiff realleges paragraphs 4 to 28 and 34 to 37.

43. Defendant proposes to exchange its stock for assets of Science Research Associates to be acquired under the agreement.

44. Defendant's stock, which it will give Plaintiff corporation in exchange for its assets, will be stock in an illegally constituted entity under section 7 of the Clayton act, and the resulting combination will be subject to numerous private triple damage suits and potential expensive divestiture action.

45. The proposed exchange of assets by Science Research Associates will thus result in irreparable economic injury to plaintiff corporation.

46. No demand has been made on the directors and officers of Plaintiff corporation in this matter since they are parties to the agreement and control as a group 64 percent of the common stock.

WHEREFORE, plaintiffs in counts 1, 2 and 3 demand judgment requiring that defendant corporation be permanently enjoined from carrying out the agreement between defendant corporation and Science Research Associates, and from acquiring all or any part of the assets of Science Research Associates in any other manner.

RICHARD ASH,
Pro Se.

MOTION OF DEFENDANT TO DISMISS.

Defendant moves the Court under Rule 12(b) for an order dismissing plaintiffs' complaint and alleges the following reasons in support thereof:

The complaint fails to state a claim upon which relief can be granted because:

A. With respect to Counts I and II:

1. The complaint does not conform to Rule 23(b) in that it does not allege adequate reasons for not making efforts to secure from the shareholders the action plaintiff desires.

2. Under the allegations of Counts I and II the determination of Ginn & Company, Harper & Row, Inc. and Sperry Rand Corp. not to bring suit against defendant bars plaintiff from maintaining this action.

3. The Court has no jurisdiction over the persons of Ginn & Company, Harper & Row, Inc., Sperry

Rand Corp. and Science Research Associates, who are indispensable parties defendant.

4. Plaintiff has not been injured in his business or property within the meaning of 15 U. S. C. §15.

B. With respect to Count III.

1. Under the allegations of Count III the determination of Science Research Associates not to bring suit against defendant bars plaintiff from maintaining this action.

2. Plaintiff does not set forth sufficient facts to show that Science Research Associates has a claim against defendant.

3. Plaintiff does not set forth sufficient facts to show that Science Research Associates has or will be damaged in any manner by any act of defendant.

4. The allegations of Count III provide no proper basis for granting an injunctive relief.

5. Under Delaware law, plaintiff does not have a claim on his own behalf.

/s/ WILBUR H. HAINES, JR.,
K. ROBERT CONRAD,
Attorneys for Defendant, International Business Machines, Inc.

March 18, 1964.

AMENDMENT TO MOTION OF DEFENDANT TO DISMISS.

Defendant amends its motion under Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' complaint, filed and served on March 18, 1964,

to add the following ground in support thereof with respect to all three counts of the complaint:

The Court lacks jurisdiction over the subject matter of the complaint because the transaction plaintiff seeks to enjoin has been consummated, as shown by the supporting affidavit of Harry Metzger attached hereto, and therefore the controversy is moot.

/s/ WILBUR H. HAINES, JR.,
K. ROBERT CONRAD,
Attorneys for Defendant, International Business Machines, Corporation.

April 7, 1964.

MEMORANDUM OPINION AND ORDER SUR DEFENDANT'S MOTION TO DISMISS (DOCUMENTS 4 AND 5).

(Order on Page 19a.)

VAN DUSEN, J. November 25, 1964.

This case is before the court on defendant's motion to dismiss, as amended (Documents 4 and 5).

Richard Ash, hereinafter called plaintiff, purports to bring this action on behalf of himself and of four corporations which have declined to bring it (Document 1). The sole relief requested is a permanent injunction preventing International Business Machines, Inc. (IBM) from the acquisition of substantially all of the assets of Science Research Associates, Inc. (Old SRA). No motion for preliminary injunction was filed and the transfer of substantially all of the assets to New SRA (a wholly owned subsidiary of IBM) has been completed.

Plaintiff was a stockholder in Old SRA[1] and is presently a stockholder in Sperry Rand Corp., Ginn & Company and Harper & Row, Inc., in whose behalf he seeks to sue. The Complaint does not allege any breach of trust or negligence on the part of the officers or directors of the above-named corporations.

Plaintiff bases his cause of action on §16 of the Clayton Act, 15 U. S. C. §26. The pertinent language of that section states:

> "Any person, firm, *corporation*, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title . . ."

Plaintiff alleges a violation of §7 of the Clayton Act, 15 U. S. C. §18, as a result of the purchase by IBM of the assets of Old SRA.

The closing of the acquisition was held on February 28, 1964. Plaintiff's Complaint was served upon the manager of the IBM sales office in Philadelphia on February 27, 1964, two days after the stockholders' meeting of Old SRA, voting approval of the acquisition,[2] and one day before the closing of the transaction.

Ash's stock holdings in these corporations, for whom he is suing derivatively, is considerably less than 1%.[3] By bring-

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[1] Plaintiff has admitted that his cause of action on behalf of Old SRA is moot (see IV at p. 23 of Document 8).

[2] Less than .02 of 1% of the shares represented at the meeting voted against the proposed acquisition (see affidavits attached to Document 5). Defendant also relies on affidavit of September 1, 1964 (Document 7).

[3] Plaintiff owns 30 shares of Ginn & Company out of 2,835,575 shares of common stock outstanding as of 12/31/63, 50 shares of Harper and Row, Inc. out of 992,681 shares of common stock outstanding as of 4/30/63, and 57 shares of Sperry Rand Corp. out of 30,756,029 shares of common stock outstanding as of 3/31/64 (see Document 1).

ing a derivative suit, Ash is essentially representing and standing in the shoes of these corporations. In instituting a suit on their behalf, he has undertaken to vindicate in the courts some right which these corporations for some reason have not felt it necessary to enforce. Ash, by letter, warned these three corporations of the impending purchase by IBM of Old SRA and these corporations decided not to sue.

Ash, as a stockholder in these corporations, votes his stock in the manner that he, as the owner, feels is in his best interests. When the management, which a stockholder elects, makes business decisions, it does so in what it determines to be the best interest of the company. A stockholder must abide by management decisions,[4] unless the management is guilty of a breach of trust or is negligent in the operation of the corporation. To allow stockholders, no matter how large or small their holdings, to dictate management decisions of large corporations would be to permit interference with the internal management of these corporations. Mr. Justice Brandeis stated, in *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 263 (1917):

> "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management . . ."

In *Swanson v. Traer*, 249 F. 2d 854, 859 (7th Cir. 1957), it was stated:

> "A corporation's right not to sue is correlative to its right to sue . . . an individual stockholder has no more right to challenge by a derivative suit a decision by the board of directors not to sue than to so challenge any other decision by the board."

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[4] Ballantine, Corporations, §43.

This is known as the sound business judgment rule. It is based on the presumption that the directors of corporations have a financial and fiduciary interest in their corporations and, therefore, have no reason to protect an outside wrongdoer at the corporation's expense.

Plaintiff attempts to distinguish the sound business judgment rule elicited above from the instant case by contending, first, that it is grounded on state law and, second, that it has only been applied to derivative suits for money damages. However, the rationale behind the rule is applicable to all derivative suits. Unless the management of a corporation has done an unreasonable act or breached their fiduciary duty, there is no basis for the institution of a derivative suit. In fact, it is arguable that a refusal by the Board of Directors, however unreasonable, should always prevent a derivative suit against a third-party wrongdoer.[5] This would leave plaintiff only a derivative suit against the directors for their negligence in refusing to sue the wrongdoer. At the very least, standing to bring a derivative suit must be based on some misconduct of the board of directors.

The plaintiff bases his right to a derivative suit on the inference that the passage of §16 of the Clayton Act was an attempt by Congress to enlist the aid of private forces in antitrust enforcement. Assuming that Congress did intend such an enlistment, it does not follow that Congress intended to enlarge a stockholder's right to bring a derivative suit.[6] To allow stockholders with minor interests to bring large scale antitrust suits, which management has

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[5] Note, 73 Harv. L. Rev. 746, 760 (1960).

[6] Plaintiff cites no case and no legislative history in support of his position, nor could the court find any support for such position. The opinions in cases such as **Bateman v. Ford Motor Company**, 202 F. Supp. 595, 596-7 (E. D. Pa. 1962), and **Rogers v. American Can Co.**, 305 F. 2d 297, 318-9 (3rd Cir. 1962), do not support plaintiff's contention when their language is read as a whole.

decided should not be instituted, would disrupt both business and the courts.[7]

Since the plaintiff has not alleged any facts to show that the boards of directors of these corporations, on whose behalf he seeks to sue derivatively, have gone beyond the bounds of reason in their decision not to sue, and he has not alleged any breach of trust on their part, plaintiff may not bring this action derivatively.

Turning to the issue of the plaintiff's right to maintain this action in his own behalf, Ash alleges that the lessening of competition resulting from IBM's acquisition of Old SRA will lead to a decline in the value of his stock in Harper & Row, Ginn & Company, and Sperry Rand. This he alleges is a threatened personal loss which gives him standing to sue individually under §16 of the Clayton Act. Plaintiff distinguishes the cases where stockholders have not had standing to sue under §4 of the Clayton Act for treble damages from the instant case, where he seeks an injunction. He reiterates his basic contention that the Congressional purpose in the passage of §16 is the encouragement of private, preventive, antitrust action.

The threatened loss which plaintiff alleges he will suffer is not a threatened loss to himself, but a threatened loss to the corporations of which he is a stockholder. As plaintiff points out, Judge Ganey did not decide this issue in *Gomberg v. Midvale Co.*, 157 F. Supp. 132 (E. D. Pa. 1955), but he did say on this point at p. 141:

"While this case (General Investment Co. v. New

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[7] As plaintiff points out, in **Gomberg v. Midvale Co.**, 157 F. Supp. 132 (E. D. Pa. 1955), at page 141, Judge Ganey said:

> "If Fanchon and Marco is the law, and we think it is, it should follow that a stockholder, in a proper case, should be able to bring a derivative action seeking injunction relief from threatened violations of the antitrust statutes."

Although a stockholder may, under proper circumstances, bring a derivative action enforcing the antitrust laws, there is no allegation in this Complaint of misconduct by the officers or directors of the corporations in whose behalf plaintiff is suing.

York Central Railroad Co., 23 F. 2d 822) along with Continental Securities and Ashwander cases may suffice as an answer to the right of the stockholder suing in his own right . . ."

These cases cited by Judge Ganey and the *Hillman* case, infra, do answer the question of plaintiff's right to maintain this action in his own behalf. In *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F. 2d 378 (6th Cir. 1926), at 379, the court said:

". . . the favor of §16 extends only to injunctive relief to be given to 'any person . . . against threatened loss or damage.' This is not appropriate language to reach such a suit as this, in which a stockholder files a representative suit, and apprehends no 'threatened loss or damage' save that which comes through the damage to his corporation."

In *General Investment Co. v. New York Central Railroad Co.*, 23 F. 2d 822 (6th Cir. 1928), the court relied on *Continental Securities*, supra, holding that §16 does not extend to a stockholder's suit because the threatened loss does not flow directly to the stockholder. Lastly, in *National Supply Co. v. Hillman*, 57 F. Supp. 4 (W. D. Pa. 1944), at page 8, the court stated:

"He (the plaintiff) has shown no special damages to himself which would qualify him to sue. He cannot sue under §16 of the Clayton Act for an injury to the plaintiff company."

On the basis of the above authorities, plaintiff has no standing to bring this suit on his own behalf under §16 of the Clayton Act on this record. Under these circumstances, the defendant's Motion (Documents 4 and 5) will be granted.[8]

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[8] It is not necessary to consider the other matters ably argued by the defendant.

ORDER.

AND NOW, November 25, 1964, IT IS ORDERED that the MOTION OF DEFENDANT TO DISMISS (Document 4), as amended (Document 5), is GRANTED, and judgment is entered for the defendant and against the plaintiff, Richard Ash, with prejudice.

/s/ FRANCIS L. VAN DUSEN,
J.

OPINION OF THE COURT.

(Filed November 17, 1965.)

BY HASTIE, *Circuit Judge*

Invoking the jurisdiction of the district court under sections 15 and 16 of the Clayton Act, 15 U. S. C. §§25 and 26, the plaintiff instituted this private civil action to enjoin the defendant, International Business Machines, Inc., (hereafter abbreviated "IBM") from acquiring the assets of another corporation, Science Research Associates, Inc. The complaint alleged that the effect of this acquisition would be a substantial lessening of competition in one or more lines of commerce, particularly in the field of "educational training materials", in violation of section 7 of the Clayton Act, 15 U. S. C. §18.

On motion, the district court dismissed the complaint upon the ground that the plaintiff lacked standing to sue. E. D. Pa. 1964, 236 F. Supp. 218. The plaintiff has appealed from that ruling.

The complaint asserts that the plaintiff is suing both

in his own right and derivatively as a stockholder of each of three corporations, Harper & Row, Inc. and Ginn & Company, with which the defendant will compete in the development and marketing of educational training materials, and Sperry Rand Corp., a competitor in the field of electronic computers.[1] The essence of the stated claim is that the acquisition of Science Research Associates by IBM will weaken the competitive position of Ginn, Sperry Rand, and Harper & Row because of the vast financial resources of IBM and certain prospective adaptations of electronic computers, in the development and production of which IBM is a leader.

The complaint also alleges that the directors of these competing corporations have rejected the plaintiff's demand that they sue IBM, and that, because of these refusals, the plaintiff, as a minority stockholder of each of the injured corporations, is now entitled to sue in the name of and on behalf of the corporations. However, nothing is pleaded or even suggested to indicate that the refusal of the directors to sue was fraudulent or collusive, or represented anything worse than unsound business judgment honestly exercised in the corporate interest.

We agree with the district court that this deficiency is fatal to the plaintiff's claim of standing to sue derivatively. The Supreme Court and, following it, the Courts of Appeals have repeatedly stated and applied the doctrine that a stockholder's derivative action, whether involving corporate refusal to bring anti-trust suits or some other controversial decision concerning the conduct of corporate affairs, can be maintained only if the stockholder

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[1] A claim asserted in the name of Science Research Associates has been abandoned. It appears that the assets of that corporation have been liquidated and almost all of the proceeds have been distributed. A certificate of dissolution has been filed with the appropriate officer of the state of incorporation.

shall allege and prove that the directors of the corporation are personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way. *Hawes v. Oakland*, 1881, 104 U. S. 450; *United Copper Securities Co. v. Amalgamated Copper Co.*, 1917, 244 U. S. 261; *Coast v. Hunt Oil Co.*, 5th Cir. 1952, 195 F. 2d 870, cert. denied 344 U. S. 836; *Swanson v. Traer*, 7th Cir. 1957, 249 F. 2d 854; *Stadin v. Union Electric Co.*, 8th Cir. 1962, 309 F. 2d 912, cert. denied 373 U. S. 915; and see our elaborate discussion of this line of cases in *Rogers v. American Can Co.*, 3 Cir. 1962, 305 F. 2d 297. Prevailing doctrine in the state courts is to the same effect. See 13 Fletcher, Cyclopedia of the Law of Private Corporations §5822.

One of the frequently quoted statements of this doctrine is that of Mr. Justice Brandeis, concurring in *Ashwander v. T. V. A.*, 1936, 297 U. S. 288, 343: "[Stockholders] cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers . . . . This rule applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. It applies . . . where the mistake alleged is the refusal to assert a seemingly clear cause of action . . ."

Also meriting particular mention because of its direct applicability here is the holding of the Court in *United Copper Securities Co. v. Amalgamated Copper Co., supra*, that a stockholder's complaint seeking to assert derivatively his corporation's right to attack a competitor's violation of the anti-trust laws is fatally defective in failing to allege that the injured corporation "is in the control of the alleged wrongdoers, or that its directors stand in any relations to them or that they have been guilty of any misconduct whatsoever". 244 U. S. at 264.

A few decisions suggest that factors other and less

compelling than bad faith or bias may, in the view of a court exercising this equitable jurisdiction, suffice to disqualify directors from representing the corporate interest and thus make it permissible that a minority stockholder sue for the corporation. *Ashwander v. T. V. A., supra,* (stockholder's standing predicated upon alleged unconstitutionality of the questioned transaction); *Hill v. Wallace,* 1922, 259 U. S. 44 (directors' refusal to act allegedly based upon fear); cf. *Klebanow v. New York Produce Exchange,* 2d Cir. 1965, 344 F. 2d 294. But, even if there may be disqualifying circumstances other than bad faith or bias, no suggestion of any such circumstance appears in this case. Therefore, the district court's ruling that the plaintiff lacked standing to sue derivatively was correct.

In addition to his derivative claim the plaintiff has pleaded that section 4 of the Clayton Act, 15 U. S. C. §15 enables a "person . . . injured in his business or property" by conduct violative of the anti-trust laws to sue in his own right, and that the plaintiff has been so injured. However, the complaint discloses that the hurtful effect of IBM's conduct upon the value of his stock in competing corporations is the only injury he claims to have suffered.

Such harm is not enough to make the plaintiff a "person . . . injured in his business or property" within the meaning of section 4 of the Clayton Act. The courts have consistently ruled that this language does not include the indirect harm that an individual may suffer as a stockholder through injury inflicted upon a corporation. *Loeb v. Eastman Kodak Co.,* 3d Cir. 1910, 183 Fed. 704; *Martens v. Barrett,* 5th Cir. 1957, 245 F. 2d 844; *Continental Securities Co. v. Michigan Central R. R.,* 6th Cir. 1926, 16 F. 2d 378, cert. denied 274 U. S. 741; *Gomberg v. Midvale Co.,* E. D. Pa. 1955, 157 F. Supp. 132, appeal dismissed for mootness *sub nom.; Brill v. General Industrial Enterprises, Inc.,* 3d Cir. 1956, 234 F. 2d 465.

Indeed, were the rule otherwise the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable personal injury to each owner of stock in the corporation.

Thus, the district court properly ruled that the plaintiff's claim of standing to sue in his own right was no better than his derivative claim.

The judgment will be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1110

RICHARD ASH, SPERRY RAND CORP., GINN & COMPANY, HARPER & ROW, INC. and SCIENCE RESEARCH ASSOCIATES,

Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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April 11, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RICHARD ASH, SPERRY RAND CORP., GINN & COMPANY, HARPER & ROW, INC. and SCIENCE RESEARCH ASSOCIATES, *Petitioner,* *vs.* INTERNATIONAL BUSINESS MACHINES, INC., *Respondent.*	No. 1110

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 236 F. Supp. 218 (1964) (Pet. App. 13a-19a).* The opinion of the Court of Appeals for the Third Circuit is reported at 353 F. 2d 491 (1965) (Pet. App. 19a-23a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

*Petitioner's Appendix is designated "Pet. App."; Respondent's Appendix is designated "Res. App.".

COUNTERSTATEMENT OF QUESTION PRESENTED

Does a stockholder of a corporation have standing, either derivatively or on his own behalf as such a stockholder, to maintain an action under Section 7 of the Clayton Act to enjoin an acquisition involving two other corporations, if the management of the corporation in which he holds stock has declined to institute such an action and if the stockholder has not alleged that management is disqualified to make an independent business judgment on the matter?

STATUTES INVOLVED

The statutory provisions involved are Sections 7 and 16 of the Clayton Act, 15 U. S. C. §§ 18 and 26. Pertinent portions of those sections are set forth in Petitioner's Appendix 1a-2a.

STATEMENT

Richard Ash (Ash) seeks review of a judgment of the United States Court of Appeals for the Third Circuit affirming an order of the United States District Court for the Eastern District of Pennsylvania dismissing his complaint for lack of standing (Pet. App. 19a). The complaint sought a permanent injunction preventing International Business Machines Corporation (IBM) from acquiring substantially all the assets of Science Research Associates, Inc. (SRA).

Ash purported to bring the action on behalf of himself and on behalf of three* corporations in which he had small stock interests. Ash had requested the corporations to

*The complaint contained a third count on behalf of SRA. That count has been dropped by Petitioner.

institute an action, but they did not do so. The District Court and the Court of Appeals for the Third Circuit both concluded that Ash did not have standing to bring the action.*

The Acquisition. On February 28, 1964, IBM acquired substantially all the assets of SRA in exchange for 128,841 shares of Capital Stock of IBM (Affidavit of Harry Metzger, paras. 3, 13, Res. App. 3b, 5b). The shares of IBM stock were distributed to the stockholders of SRA, who received one share of Capital Stock of IBM for every 13.841 shares of Common Stock of SRA. On the basis of a price of $483.50 per share of Capital Stock of IBM (the closing price on the New York Stock Exchange on December 18, 1963, the date the letter of intent was executed), the consideration to be received by each stockholder of SRA was equivalent to $35 per share of SRA Common Stock (which was trading over the counter on December 18, 1963, at approximately $28 per share).

The transaction was approved at a meeting held February 25, 1964, by an overwhelming majority of shareholders of SRA, each of whom had received a proxy statement describing the terms of the transaction (*id.*, para 8, Res. App. 4b). 1,710,477 of the 1,779,816 outstanding shares of SRA were represented at the meeting. 1,710,217 shares were voted in favor of the proposed transaction. 260 shares (including Ash's 25 shares), constituting less than .02 of 1% of the shares represented at the meeting, voted against approval of the transaction (*id.*, para. 12, Res. App. 5b).

The Complaint. The complaint was served upon the manager of the IBM sales office in Philadelphia on February

*The courts below did not reach the other grounds for dismissal asserted by Respondent: (i) mootness, (ii) failure to serve indispensable parties and (iii) failure to comply with Rule 23(b) of the Federal Rules of Civil Procedure.

27, 1964. The sole relief sought by Ash was an injunction preventing IBM from acquiring the assets of SRA; he did not seek a temporary restraining order or preliminary injunction.

The complaint set forth three claims for relief (the last of which has been abandoned). Count I alleged a cause of action pursuant to Sections 7, 15 and 16 of the Clayton Act, 15 U. S. C. §§ 18, 25 and 26, on behalf of Ash and on behalf of Harper & Row, Inc. (Harper) and Ginn & Co. (Ginn), corporations which Ash alleged were competitors of SRA and in which Ash held small stock interests. Ash claimed that the acquisition would substantially lessen competition in the field of "educational training materials" (Complaint, para. 21,, Pet. App. 6a). Ash admitted that Ginn refused to assert this claim against IBM and that Harper had not responded to his demand that it bring such action (*id.*, para. 29, Pet. App. 8a).

Count II is essentially the same as Count I, except that Ash alleged a cause of action on behalf of himself and on behalf of Sperry Rand Corp. (Sperry), a corporation which was alleged to be a competitor of IBM's and in which Ash had a small stock interest. As in the first count, Ash admitted that Sperry had refused to bring an action against IBM (*id.*, para. 38, Pet. App. 9a).

The sole basis upon which Ash claimed the right to maintain this action was his alleged ownership of 50 shares of Common Stock of Harper, 30 shares of Common Stock of Ginn and 57 shares of Common Stock of Sperry, or less than 0.0005 of 1% of the outstanding stock of those corporations. See 1965 Moody's Industrial Manual 897, 1774-77, 2100-01.

ARGUMENT

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

Ash purported to bring Count I on behalf of himself and Harper and Ginn. Count II is alleged to be on behalf of himself and Sperry. As the courts below have held, both Counts are fatally deficient because Ash does not have standing to sue on his own behalf and does not have standing to sue on behalf of the corporations in which he holds stock. Ash maintains that the policies underlying Section 7 of the Clayton Act require that stockholders be permitted to bring suits on behalf of their corporations. He cites no support for that position, and none exists. While Congress undoubtedly wished to encourage private enforcement of the antitrust laws by persons aggrieved by violations, it did not intend in the process to authorize litigation by "strangers" to the violations and thereby to subvert the orderly management of corporations.

First. The Business Judgment Rule Has Long Been Settled In The Decisional Law Of This Court.

In his complaint, Ash admitted that the management of each corporation declined to sue, but did not allege that the officers or directors of Harper, Ginn or Sperry are or have been disqualified from exercising their business judgment (Complaint, paras. 29, 38, Pet. App. 8a, 9a).

Since *Hawes* v. *Oakland,* 104 U. S. 450, this Court has made crystal clear that a stockholder has a right to maintain an action on behalf of a corporation in which he holds stock only if the management of that corporation is disqualified from exercising independent judgment. Not only does the Petition fail to show a conflict of decisions on this

subject, it does not cite one case lending any support to its argument to the contrary, and none exists.*

In *Hawes* the Court defined the circumstances which would permit a stockholder to assert a claim on behalf of his corporation:

> "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

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*Ash cites six cases involving the submission by a corporation to allegedly illegal taxes or allegedly illegal governmental action. Suit to prevent, in effect, payment by the corporation of an illegal tax is meaningfully different from a derivative action, such as the instant one, against a third party. See *Gen'l Inv. Co.* v. *New York Central R. R.*, 23 F. 2d 822, 823-24 (6th Cir. 1928), *cert. denied*, 277 U. S. 588.

The two tax cases cited by Ash are: *Dodge* v. *Woolsey*, 18 How. 331; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429. *Dodge* held that the directors' failure to sue to recover an illegally collected tax was a breach of trust. The directors thought the tax illegal, had made two previous protests against the constitutionality of the tax, and had resolved not to pay the tax unless compelled to do so. The Court said that "the refusal upon the part of the directors, *by their own showing*, partakes more of disregard of duty, than of an error of judgment." (Emphasis added.) The directors were joined as defendants making clear that Woolsey was charging them with a breach of trust. In *Pollock* a stockholder in a bank sought a decree against the defendant and its directors declaring a proposed tax to be unconstitutional and enjoining the payment of the tax.

The four cases cited by Ash involving submission by a corporation to allegedly illegal governmental action are: *Ashwander* v. *T. V. A.*, 297 U. S. 288; *Chicago* v. *Mills*, 204 U. S. 321; *Cotting* v. *Kansas City Stockyard Co.*, 183 U. S. 79; *Greenwood* v. *Freight Co.*, 105 U. S. 13. Participation or acquiescence by the directors of a corporation in an illegal act, which includes illegality based on the lack of lawful authority on the part of those with whom the corporation is attempting to deal, constitutes a breach of duty on the part of the directors enabling a stockholder to seek equitable relief. *Ashwander* v. *T. V. A.*, *supra* at 319-20.

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases." 104 U. S. at 460.

The *Hawes* doctrine was reaffirmed in the context of the antitrust laws by the decision in *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263-64. The Court upheld dismissal of a complaint by a stockholder seeking to enforce, on behalf of the nominal corporate defendant, a claim against a third party for violation of the Sherman Act. 15 U. S. C. §§ 1-7. Mr. Justice Brandeis stated:

"Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is,

> like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery. . . . The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation."

These two decisions have been repeatedly followed and applied. See *Swanson* v. *Traer,* 354 U. S. 114, *on remand dismissal aff'd,* 249 F. 2d 854 (7th Cir. 1957); *Stadin* v. *Union Electric Co.,* 309 F. 2d 912, 921-22 (8th Cir. 1962), *cert. denied,* 373 U. S. 915; *Okin* v. *SEC,* 143 F. 2d 943 (2d Cir. 1944). See also *McClure* v. *Borne Chemical Co.,* 292 F. 2d 824, 827-28 (3d Cir. 1961) (dictum), *cert. denied,* 368 U. S. 939; *Rogers* v. *American Can Co.,* 305 F. 2d 297 (3d Cir. 1962) (a derivative suit against directors, which distinguishes *Hawes* and *United Copper,* the board of directors of the nominal defendant being implicated in the alleged illegal acts); Note, 73 HARV. L. REV. 746, 760 (1960).

Thus, the authorities clearly support the decisions below. Speaking for a unanimous Court of Appeals, Judge Hastie

noted that: ". . . [N]othing is pleaded or even suggested to indicate that the refusal of the directors to sue was fraudulent or collusive, or represented anything worse than unsound business judgment honestly exercised in the corporate interest." (Pet. App. 20a). Ash attempts to circumvent this fundamental defect in pleading by contending that for present purposes the allegations of the complaint should be deemed true, and therefore (so Ash argues) the directors acted improperly in not seeking redress against IBM (Pet., p. 8). Ash is incorrect in stating that, for purposes of the motion to dismiss the complaint, IBM's acquisition of SRA must be assumed to have violated Section 7 of the Clayton Act*; the management of each of the corporations was entitled to determine for itself that question. But even if it is assumed that the complaint states a valid claim on behalf of the beneficiary corporations, it does not follow that the directors are guilty of misconduct in declining to bring the action. It is easy enough to state a claim, but the corporations still have to prove the allegations. In determining whether to bring suit, management has to weigh the problems of proof, the costs, and the possible disruption of its business. There has been no showing or even contention that the managements of Harper, Ginn and Sperry were unable to make an informed judgment on whether to bring an action against IBM.

The management of a corporation is entrusted with looking after the best interests of all stockholders. One stockholder should not be permitted to force corporate action which may be to the detriment of the other stockholders—

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*Only allegations of fact are assumed to be true on a motion to dismiss; conclusory allegations of unlawfulness are not. See *Pauling* v. *McElroy*, 278 F. 2d 252 (D. C. Cir. 1960); *Dunn* v. *Gazzola*, 216 F. 2d 709, 711 (1st Cir. 1954); *Smith* v. *United States*, 113 F. Supp. 131 (D. Del. 1953); *Le Clair* v. *Swift*, 76 F. Supp. 729 (E. D. Wisc. 1948).

unless management is demonstrated to be incapable of impartially determining the interests of the corporation. Ash has not set forth any reasons for eliminating the "business judgment" rule that would justify this Court's reexamination of that longstanding doctrine.

Second. The Business Judgment Rule Cannot Be Undermined By An Individual Action On Petitioner's Own Behalf.

Ash alleges that Counts I and II are brought on behalf of himself as well as on behalf of the named corporations (Complaint, paras. 2, 31, Pet. App. 4a, 8a). (The complaint, however, does not allege in either Count that Ash himself will suffer damage. Ash apparently bases the action on his own behalf on possible diminution of the value of his stock interests.)

A private plaintiff suing under Section 16 of the Clayton Act to enjoin antitrust violations must demonstrate "threatened loss or damage" flowing directly from the alleged violation to himself. Under Section 4 of the Clayton Act a suit for damages may be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." There is no difference in the standard to be applied in determining the rights of a private party under those two sections of the Clayton Act. An allegation of direct injury to the plaintiff is a prerequiste.

> "Section 15 of the Clayton Act, 15 U. S. C. § 25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violations of certain of the antitrust laws, including price discrimination. Under § 16 of the Act, 15 U. S. C. § 26, a private plaintiff may obtain injunctive relief against such violations only on a show-

> ing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff, *Beegle* v. *Thompson,* 138 F. 2d 875, 881 (1943). The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *United States* v. *Borden Co.,* 347 U. S. 514, 518.

The *Beegle* case referred to in *Borden* involved the standing of a plaintiff to sue for treble damages under Section 4 of the Clayton Act. Its citation in connection with the determination of rights under Section 16 demonstrates that the Court considers the criteria for determining standing under the two sections to be the same, namely, a showing of personal loss or damage.

The courts have consistently held that a stockholder may not sue on his own behalf for damages under Section 4 of the Clayton Act resulting from injury to the corporation in which he owns stock, even if he owns all the stock or the corporation has ceased to exist. See *Walker Distributing Co.* v. *Lucky Lager Brewing Co.,* 323 F. 2d 1, 10 (9th Cir. 1963); *Martens* v. *Barrett,* 245 F. 2d 844 (5th Cir. 1957) (collecting cases at 846 n. 4); *New Sanitary Towel Supply, Inc.* v. *Consolidated Laundries Corp.,* 211 F. Supp. 276 (S. D. N. Y. 1962); *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.,* 193 F. Supp. 401, 407 (S. D. N. Y. 1961); *Gomberg* v. *Midvale Co.,* 157 F. Supp. 132, 140 (E. D. Pa. 1955), *appeal dismissed sub nom. Brill* v. *Gen. Industrial Enterprises, Inc.,* 234 F. 2d 465 (3d Cir. 1956).

The courts have likewise held that a stockholder's stock interest does not give him standing to sue for injunctive

relief under Section 16 of the Clayton Act to prevent alleged damage to his corporation.* See *General Inv. Co.* v. *New York Central R. R.*, 23 F. 2d 822 (6th Cir. 1928), *cert. denied*, 277 U. S. 588; *Continental Securities Co.* v. *Michigan Central R. R.*, 16 F. 2d 378 (6th Cir. 1926); *Gomberg* v. *Midvale Co., supra; National Supply Co.* v. *Hillman*, 57 F. Supp. 4 (W. D. Pa. 1944).**

Ash's only interest in the cause of action is as a holder of less than 0.0005 of 1% of the stock of each of Harper, Ginn and Sperry. In the face of the plain statutory language, the decisions of this and the lower federal courts, and the failure to allege individual damage, the contentions advanced in the Petition do not warrant review here:

> "Indeed, were the rule otherwise the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable

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*In an analogous situation—an attempt by a person not a party to a consent decree to enforce the decree in a contempt action—the Second Circuit recently held that policy considerations supported refusal to permit a party alien to the action to enforce a consent decree, *United States* v. *American Society of Composers, Authors and Publishers*, 341 F. 2d 1003, 1008 (2d Cir. 1965), *cert. denied*, 382 U. S. 38:

> "Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights."

**Ash attempts to distinguish *Continental Securities* by arguing that the injury in question was the threat of treble damage suits to the corporation; it was not (see 16 F. 2d at 380).

Ash makes no effort to distinguish *General Inv. Co.* v. *New York Central R. R.* and *National Supply Co.* v. *Hillman* which stand directly against his position.

personal injury to each owner of stock in the corporation." (Opinion below, Pet. App. 23a).

Third. The Business Judgment Rule Does Not Impair Private Enforcement Of The Antitrust Laws.

Ash argues that if he is held to lack standing to sue it will impair private enforcement of the antitrust laws. His error, however, stems from confusing private enforcement with individual enforcement by Ash. The antitrust laws envision two types of enforcement: public and private. In this case the acquisition by Respondent has come to the attention of the public authorities charged with enforcing the antitrust laws.* And, the private parties in this case whose interests are allegedly affected—Harper, Ginn and Sperry—have declined to sue. Ash's objection is not that there is a lack of private enforcement but rather that he, individually, should be entitled to sue when he disagrees with the proper private parties' decisions not to do so.**

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*Ash appended to his Memorandum in Opposition to Defendant's Motion To Dismiss in the District Court, copies of his correspondence with the Antitrust Division of the Department of Justice calling attention to the acquisition.

**Ash cites Blake, *Shareholders' Role in Antitrust Enforcement*, 110 U. Pa. L. Rev. 143, 149 (1961), as stating that "it is open to question whether Congress' policy of encouraging antitrust enforcement through private suits should be defeated by giving weight to management reluctance to upset perhaps overly amicable relationships within the industry." Professor Blake's article, however, goes on (at 156) to make clear that this suggestion applies to a continuing course of conduct and *per se* violations such as price fixing and not to a single transaction, such as a merger. "In the latter class of cases [such as price fixing], *but not the former* [such as mergers], shareholder intervention through derivative suits seems defensible." (Emphasis added.)

CONCLUSION

In sum, the petition seeks review of a decision that was clearly correct in light of the unambiguous precedents, reveals no conflict of decisions, and raises no novel or important question of law. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP H. STRUBING
GEORGE B. TURNER
Attorneys for Respondent.

PEPPER, HAMILTON & SCHEETZ
CRAVATH, SWAINE & MOORE
Of Counsel.

APPENDIX.

AFFIDAVIT OF HENRY W. TRIMBLE, JR., IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

HENRY W. TRIMBLE, JR., being duly sworn, deposes and says:

(1) I am the Secretary of International Business Machines Corporation, a New York corporation (hereinafter called IBM).

(2) Pursuant to an Agreement and Plan of Reorganization dated January 21, 1964, between IBM and Science Research Associates, Inc., a Delaware corporation (hereinafter called SRA), substantially all the assets of SRA were transferred to a wholly-owned subsidiary of IBM in exchange for the delivery to SRA of 128,841 shares of Capital Stock of IBM and the assumption by said wholly-owned subsidiary of IBM of the liabilities of SRA. In accordance with said Agreement and Plan of Reorganization, the stockholders of SRA became entitled to exchange their certificates representing shares of common stock of SRA for certificates representing shares of Capital Stock of IBM on a basis of 13.814 shares of SRA stock for one share of IBM stock. Harris Trust and Savings Bank was designated to act as agent for SRA stockholders in effecting that exchange. As of August 25, 1964, all but 600 of the 1,779,816 shares of Common Stock of SRA had been surrendered for cancellation in exchange for shares of Capital Stock of IBM. At that date Harris Trust and

Savings Bank held for the account of the holders of said 600 shares of Common Stock of SRA, 45 shares of Capital Stock of IBM and $4,444.78 for the settlement of fractional shares of Common Stock of SRA.

HENRY W. TRIMBLE, JR.
Henry W. Trimble, Jr.

Subscribed and sworn to before me this 28th day of August, 1964.

ELSIE M. VOGLER,
Notary Public.

ELSIE M. VOGLER
Notary Public, State of New York
State No. 60-9476200
Qualified in Westchester County
Cert. filed in New York County
Term Expires March 30, 1966

AFFIDAVIT OF HARRY METZGER IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS.

STATE OF ILLINOIS,
COUNTY OF COOK, } *ss.:*

HARRY METZGER, being duly sworn, deposes and says:

(1) I am the Secretary of 259 East Erie Street Liquidating Corporation (formerly Science Research Associates, Inc.), a Delaware corporation (hereinafter called Old SRA). A Certificate of Dissolution of Old SRA has been filed, and Old SRA will be effectively dissolved upon publication of the Certificate of Dissolution in accordance with Section 275 of the General Corporation Law of Delaware.

(2) I also am the Secretary of Science Research Associates, Inc. (formerly SRA Acquisition, Inc.), a Delaware corporation (hereinafter called New SRA). The plaintiff, Richard Ash, was a shareholder of record of Old SRA; he is not and has never been a shareholder of New SRA. New SRA is a wholly owned subsidiary of International Business Machines Corporation, a New York corporation (hereinafter called IBM).

(3) By letter agreement dated December 18, 1963, between Old SRA and IBM (attached hereto as Exhibit A), IBM agreed to purchase, either directly or through a subsidiary organized for that purpose, the business and substantially all the assets of Old SRA in exchange for the issuance to Old SRA of 128,841 shares of Capital Stock, par value $5 per share (hereinafter called the IBM Shares), of IBM and the assumption by IBM or such subsidiary of substantially all the liabilities of Old SRA. That agreement was subject to necessary corporate action and the execu-

tion and delivery of a formal agreement setting forth the detailed terms and conditions of the transaction.

(4) On December 18, 1963, the agreement was publicly announced (see Press Release attached as Exhibit B), and such announcement was widely reported on the financial pages of newspapers and other publications (see, *e.g., The Wall Street Journal,* December 20, 1963, pp. 1, 4; *The New York Times,* December 20, 1963, pp. 43, 47; *The Philadelphia Evening Bulletin,* December 20, 1963, p. 35).

(5) On January 7, 1964, the Board of Directors of Old SRA approved the contemplated transaction and called a special meeting of the stockholders of Old SRA to be held on February 25, 1964, (i) to approve the transaction, (ii) to approve the change of name of Old SRA to "259 East Erie Street Liquidating Corporation" subsequent to completion of the transfer of assets and (iii) to approve the dissolution of Old SRA.

(6) On January 21, 1964, IBM and Old SRA executed and delivered the Agreement and Plan of Reorganization dated January 21, 1964 (hereinafter called the Agreement), a copy of which is attached hereto as Exhibit C.

(7) Attached hereto as Exhibits D and E are letters dated January 20, 1964 and February 5, 1964, from Richard A. Ash to the President of Old SRA.

(8) On or about January 28, 1964, Old SRA mailed or delivered to its stockholders of record on January 21, 1964, a letter from its President, a Notice of Special Meeting, an Information Statement (copies of which are attached as Exhibit F) and a form of Proxy.

(9) On February 10, 1964, a Notice of Special Meeting of Stockholders of Old SRA was published pursuant to Section 275(a) of the General Corporation

Law of Delaware in connection with the proposed dissolution of SRA.

(10) Paragraph 5 of the Agreement provided that the closing of the sale of substantially all the assets of Old SRA was to take place on the later of February 26, 1964, or the tenth business day following receipt by Old SRA of a satisfactory ruling from the Internal Revenue Service as to the tax-free character of the proposed transaction. It was the intention of both parties that, if possible, the closing would take place at the end of a calendar month.

(11) On February 20, 1964, Old SRA received a ruling from the Internal Revenue Service satisfactory to Old SRA, except that clarification was required on two points. That clarification was included in a subsequent letter from the Internal Revenue Service.

(12) On February 25, 1964, the stockholders of Old SRA, by a vote of 1,710,217 shares to 260 shares (an aggregate of 1,779,816 shares being outstanding), approved the proposed transaction with IBM, including the change of name of Old SRA to "259 East Erie Street Liquidating Corporation" and the liquidation and dissolution of Old SRA.

(13) The closing under the Agreement was held on February 28, 1964, the last business day in the month of February. On that date substantially all the assets of Old SRA were transferred by Old SRA to New SRA, under its then name "SRA Acquisition, Inc.", and New SRA assumed substantially all the liabilities of Old SRA. IBM issued to old SRA a certificate representing the IBM Shares.

(14) In accordance with the Agreement, commencing on March 2, 1964, the IBM Shares were available for distribution pro rata, to the holders of Common Stock of Old SRA upon surrender for cancella-

tion of their shares of Common Stock of Old SRA. As of March 30, 1964, 1,454,751 of the 1,779,816 shares of Common Stock of Old SRA had been surrendered for cancellation in exchange for IBM Shares. The remaining IBM Shares are held by Harris Trust and Savings Bank as agent for the holders of Common Stock of Old SRA.

(15) On March 4, 1964, the name of New SRA was changed from "SRA Acquisition, Inc.", to "Science Research Associates, Inc.", and the name of Old SRA was changed to "259 East Erie Street Liquidating Corporation".

(16) On April 1, 1964, Old SRA filed a certificate of Dissolution in the office of the Secretary of State of the State of Delaware pursuant to Section 275 of the General Corporation Law of the State of Delaware.

(17) Old SRA is no longer carrying on any business; all its assets have been liquidated and distributed, except for $50,000 which is being held to cover liquidation and dissolution expenses, pursuant to paragraph 6(c) of the Agreement. Any part of that amount not expended in connection with the liquidation and dissolution will be paid to IBM in accordance with the Agreement.

HARRY METZGER.
Harry Metzger.

Subscribed and sworn to before me this 1st day of April, 1964.

JOAN M. PIRAINO,
Notary Public.

(Seal)

Exhibit A.

INTERNATIONAL BUSINESS MACHINES CORPORATION
590 Madison Avenue, New York 22, N. Y.

Office of Vice President

December 18, 1963

Lyle M. Spencer, President
Science Research Associates, Inc.
259 E. Erie Street
Chicago, Illinois

Dear Sir:

Confirming the understanding reached in our recent conversations, International Business Machines Corporation (IBM) has agreed to purchase, either directly or through a subsidiary organized for that purpose, the business and substantially all the assets of Science Research Associates, Inc. (SRA) in exchange for the issuance to SRA of 128,841 shares of IBM's Capital Stock, and the assumption by IBM, or such subsidiary, of substantially all the liabilities of SRA.

That understanding is subject to the following conditions:

(1) All requisite corporate action shall be taken to approve the terms of the understanding and to authorize the transaction, including approval by the Boards of Directors of SRA and IBM and by the stockholders of SRA at a special meeting to be called for that purpose.

(2) SRA and IBM shall sign and deliver a formal agreement setting forth the detailed terms and conditions of the transaction, including the following:

(i) customary and adequate representations and warranties of SRA as to its financial statements, litigation, taxes, title to property, long-term leases and contracts, employment agreements and other compensation arrangements, patents, trademarks, copyrights, and such other items as may bear upon the value of the business and assets of SRA to be transferred, such representations and warranties, however, not to survive the closing;

(ii) appropriate provisions for the termination of the agreement in the event of the institution or threat of litigation or administrative proceedings which would have a materially adverse effect on IBM or SRA or upon the validity of the transaction hereby contemplated;

(iii) a representation by each "affiliate" of SRA that he will acquire the IBM shares to be acquired by him on the liquidation of SRA for investment with no present intention of selling the same except that he may sell portions of such stock within the limits provided in Rule 133 under the Securities Act of 1933; and

(iv) agreement by the President of SRA that he will, after consumation of the transaction, become an employee of IBM or such subsidiary and will not engage in any activities competitive with the business of SRA, and that he will use his best efforts to obtain similar agreements from such other key employees of SRA as shall be designated by IBM and such President.

(3) If the agreement contemplated by paragraph (2) is not signed by IBM and SRA by January 31, 1964, this letter of understanding shall thereupon terminate.

Neither SRA nor IBM has employed a broker or finder in connection with the proposed transaction and all nego-

tiations have been carried out between the parties without the intervention of any other person. SRA and IBM shall each be responsible for its own fees and expenses incurred in connection with the negotiation of the understanding described herein and consummation of the proposed transaction.

Please confirm your agreement with the foregoing by signing where indicated below.

Very truly yours,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

By J. W. BIRKENSTOCK
J. W. Birkenstock
Vice President

Confirmed:

SCIENCE RESEARCH ASSOCIATES, INC.

By LYLE M. SPENCER
Lyle M. Spencer
President

Exhibit B.

For release:

IMMEDIATE

From

IBM

International Business Machines Corporation
590 Madison Avenue
New York 22, New York

Arnold Lerner
PLaza 3-1900

CHICAGO, Dec. 18 . . . Science Research Associates, Inc., a Chicago-based publisher of educational materials and psychological tests, will become affiliated with International Business Machines Corporation, it was announced today by Lyle M. Spencer, president of SRA, and Thomas J. Watson Jr., chairman of IBM.

The business and operations of SRA will be carried on by a separate subsidiary of IBM under the direction of the present management and staff, the announcement said. Its headquarters will continue to be in Chicago. IBM will issue 128,841 shares of its capital stock in exchange for the SRA business and assets. Based on its 1,779,816 outstanding shares, SRA will receive one IBM share for every 13.814 shares of SRA.

The arrangements are subject to working out the details of a formal agreement and to approval by both boards of directors and by the Science Research Associates stockholders.

Science Research Associates has a staff of 700 employees. During its fiscal year ended June 30, 1963, its total sales were $13,900,000 and its net income $1,320,000.

SRA develops and publishes new types of instructional materials in basic subjects for elementary schools and high schools. The company specializes in building modern learning systems, including its well known Reading Laboratories.

In the area of testing, SRA's activities include the development and publication of a wide variety of standardized intelligence, aptitude and achievement tests and administration of several national testing programs, including the National Merit Scholarship Qualifying Test. SRA's materials in all these fields are widely approved by educators and are extensively used throughout the country.

Mr. Watson said: "We at IBM are very pleased to have Science Research Associates join our organization. By combining resources, we believe that together we will be able to make increasingly important contributions to the growing educational needs of our country and other nations."

Mr. Spencer said: "Over the past twenty-five years, Science Research Associates has devoted its efforts to improving the quality of education by supplying teachers with better types of learning systems. In joining IBM, we expect to do an even better job."

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Exhibit C.

(Omitted)

Exhibit D.

Richard A. Ash
School of Law
University of Pennsylvania
Philadelphia 4, Pennsylvania

January 17, 1964

Mr. Lyle M. Spencer
President, Science Research Associates
259 East Erie Street
Chicago, Illinois

Dear Mr. Spencer:

I am a stockholder in Science Research Associates since its initial public offering in December 1961. I was deeply disturbed and perplexed to learn via the papers of your proposed merger, so much so in fact that I discussed the matter with your treasurer by long distance telephone. I purchased stock in your company on the basis of my desire to participate in the particular opportunity held out in your offering circular. On the basis of my belief in the potential of your company I retained my interest during a perilous phase in the securities' market. Your company has shown impressive growth trends, and there is every indication that your future is extremely bright. You are a virile, creative company on the edge of tapping a vast new market, that of programmed teaching techniques. It is difficult to understand how your stockholders are benefited by spreading your opportunity over a much wider base. I feel that your actions in this matter

in first inducing the sale of stock to the public by holding out a particular opportunity, and then, with no intervening justification through change of corporate fortune, to utilize your control to, in essence, withdraw the opportunity and resell to a bidder more favorable to insider interests, is at the least grossly unfair. I feel very much like a customer at a race track who after placing a bet on a 100-1 shot is told when the race is well underway and his horse has taken a substantial lead that the management has sold the track and voided his ticket, but he will be given twice his money back. It is my understanding that you personally control approximately 54% of the corporation's stock. If the merger is consummated you will receive about 34 million value of highly negotiable I. B. M. stock, in addition retaining your present position of leadership of S. R. A., operating after the merger as a subsidiary of I. B. M. It seems clear that you are in no position to fairly represent the interests of the outside stockholders. The very minimum of fairness would dictate that the stockholders be divided into two groups to vote on the question.

I think that you should seriously reconsider the appropriateness of this merger. I do not see why Science Research Associates should throw in its winning hand now. Certainly a jointly owned and operated subsidiary could utilize your additive talents without the necessity of obliterating your corporate identity. It is my understanding that I. B. M. has a long history of anti-competitive behavior and is currently operating under several consent decrees. I do not feel that the interests of American education can be furthered by submerging a virile creative organization such as yours in a corporate conformity structure such as I. B. M. I do not feel this merger is favorable to the interests of your outside stockholders or the American public.

Sincerely,

RICHARD ASH
Richard Ash

Exhibit E

Richard A. Ash
School of Law
University of Pennsylvania
Philadelphia 4, Pennsylvania

Mr. Lyle M. Spencer
President
Science Research Associates
259 East Erie Street
Chicago 11,
Illinois

Dear Mr. Spencer,

I appreciate your prompt and courteous attention to my earlier letter.

I have recently received the reorganization proposal, and now register my formal protest to your proposed sale of corporation assets to I. B. M. I feel the transaction is violative of section seven of the Clayton Act (anti-trust statute) and exposes the resultant combination to legal action with consequent economic injury to your stockholders.

In addition I protest the valuation accorded to stockholders similarly situated to myself. I feel that my interests have not been properly represented or protected in this matter.

Yours truly,

RICHARD A. ASH
Richard A. Ash

Exhibit F

(Omitted)